No. 78-809

In the Supreme Court of the United States

OCTOBER TERM, 1978

VENOLA WALTON, APPELLANT

v.

SMALL BUSINESS ADMINISTRATION

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO DISMISS

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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1. Appellant invokes this Court's jurisdiction under 28 U.S.C. 1252. Section 1252 allows appeal to this Court only when a court of the United States has held an act of Congress unconstitutional. No such finding has been made in this case (see J.S. App. 22a-24a, 26a), and this Court accordingly does not have jurisdiction over the appeal.

2. Treating the papers as a petition for a writ of certiorari (see 28 U.S.C. 2103), the Court should deny the petition.

a. Appellant asserts (J.S. 15) that the Small Business Administration discriminated against her on the basis of her sex and race in denying loan applications and defamed her by including false and damaging documents in her file.

In November 1964, the SBA granted appellant a $6,000 loan to operate a dressmaking business. In November 1965, she defaulted on the loan and the Internal Revenue Service closed her business for non-payment of taxes (J.S. App. 22a n.1). The SBA demanded that appellant satisfy the outstanding debt in June 1966 and again in November 1968, but without success (Exs. J, L).[1] The SBA ultimately determined that appellant was judgment proof, charged off her loan with an unpaid balance of $5,244.65, and ceased collection efforts (Ex. M). Meanwhile, in 1965, appellant sought another SBA loan, which was denied (J.S. App. 22a). In 1975 she again applied for a loan, this time in the amount of $40,000 (Ex. P). The loan was denied in January 1975 because appellant was an established credit risk, lacked management experience, and was unlikely to attain her predicted earnings (Ex. R). She resubmitted the application, but it was rejected for essentially the same reasons in April and June 1975 (Exs. V, Y).

Appellant then filed this suit in the United States District Court for the Southern District of New York, alleging race and sex discrimination and claiming that the SBA had defamed her. The district court dismissed the discrimination claim on the government's motion for summary judgment, finding that the agency's decisions "were substantially supported" and that appellant had not "advanced even one fact suggestive of discrimination" (J.S. App. 23a-24a). The court dismissed the defamation claim for lack of subject matter jurisdiction because appellant had not filed an administrative claim as required by the Federal Tort Claims Act, 28 U.S.C.

[1]"Ex." refers to exhibits to the government's "Statement Pursuant to Rule 9(g)" filed in the district court.

2675(a) (J.S. App. 23a).[2] The court also held that appellant's cause of action for defamation was excluded from the Tort Claims Act by 28 U.S.C. 2680(h) and was thus barred by sovereign immunity (*ibid.*).

The court of appeals affirmed on the opinion of the district court (J.S. App. 26a) and denied a petition for rehearing (*id.* at 27a).

b. Appellant's discrimination claim has been determined to be without factual basis by the district court and the court of appeals, and further review by this Court is not warranted. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

Appellant's defamation claim, on the other hand, is barred for at least three reasons: as the courts below correctly held, the United States has not waived sovereign immunity as to defamation claims, the claim concerning the 1965 application was not brought within the statute of limitations, and the claim is premature. Appellant has made no attempt to rebut any of these conclusions.[3]

[2]The district court also held that all claims stemming from appellant's 1965 loan application were barred by the two-year statute of limitations of the Tort Claims Act, 28 U.S.C. 2401(b) (J.S. App. 23a).

[3]Appellant asserts (J.S. 9, 10, 13, 15) that the government should not have been permitted to amend its answer to assert the statute of limitations. This amendment was appropriate because appellant's original complaint did not make clear that her tort claim related to the 1965 loan. The trial court acted within its broad discretion in granting leave to amend the answer (Fed. R. Civ. P. 15(a)), particularly since appellant showed no prejudice as a result of the amendment.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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